

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	ET Docket No. 04-295
Communications Assistance for Law Enforcement)	RM-10865
Act and Broadband Access and Services)	

**REPLY COMMENTS OF
VONAGE HOLDINGS CORP.**

I. INTRODUCTION

Vonage Holdings Corp. (“Vonage”), by undersigned counsel, submits these reply comments concerning the Notice of Proposed Rulemaking (“NPRM”)¹ issued by the Federal Communications Commission (“Commission”) in this proceeding seeking comment on the Communications Assistance for Law Enforcement Act of 1994 (“CALEA”).² Vonage is committed to working with law enforcement agencies to provide the information they require. Vonage shares the concern of the Commission that law enforcement agencies continue to have access to the data and information that assists law enforcement agencies in combating terrorists, spies and criminals. Congress passed CALEA to maintain the ability of law enforcement agencies to conduct lawful electronic surveillance. Vonage emphasizes that, without exception, the Company has complied with all subpoena requests from law enforcement agencies, including providing call logs, records, and other account information irrespective of any CALEA-imposed obligations.

¹ *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, FCC 04-187, *Notice of Proposed Rulemaking and Declaratory Ruling*, ET Docket No. 04-295, RM-10865 (rel. Aug. 9, 2004) (“NPRM”).

² *See* 47 U.S.C. §§ 1001-1021.

Vonage has met directly with the Federal Bureau of Investigation and is engaged in coordinating technical discussions with the agency to ensure that the Company can continue to provide information that law enforcement requires. Vonage has not encountered a situation where the Company was unable to provide the information requested by law enforcement agencies. Vonage recognizes that lawfully intercepting calls and other data that traverses broadband networks raises important issues that require examination by the Commission.

Vonage is committed to assisting and enabling law enforcement agencies in protecting the citizenry of the United States and will continue to do so regardless of the outcome of this proceeding. Even if the Commission should determine that CALEA is inapplicable to broadband applications, such as Vonage's, the Company is nevertheless committed to working cooperatively with law enforcement to develop modes and means for timely delivery of lawfully requested information. The Joint Petition filed by a group of law enforcement agencies that initiated the Commission's proceeding provided "CALEA did not provide law enforcement with any additional surveillance authority."³ Further, the law is clear that the Internet is not exempt from existing statutes that obligate companies to cooperate with law enforcement.⁴ Accordingly, this proceeding is not about whether companies like Vonage have an obligation to respond to the law enforcement's lawful request for information—they do; instead, the question facing the

³ See *United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, RM No. 10865, ET Docket No. 04-295, at 3 (filed Mar. 10, 2004) ("Joint Petition").

⁴ See, e.g., *Joint Comments of Industry and Public Interest Submitted on behalf of 8x8, Inc. et al.*, at 11-12 (dated Nov. 8, 2004).

Commission is whether the scope of the CALEA statute as drafted by Congress includes technologies that have proliferated since passage of CALEA over ten years ago.

II. THE COMMISSION SHOULD SEEK MORE SPECIFICITY CONCERNING PROBLEMS FACED BY LAW ENFORCEMENT

In reviewing the comments filed in this proceeding, it becomes clear that providers of all different types of communications services agree that cooperating with law enforcement is not only important, but required under existing law.⁵ In determining the applicability of CALEA to new communications services, the Commission must recognize that the record does not yet contain evidence that would suggest that law enforcement agencies are incapable of obtaining the information they require.⁶ Setting aside the issue of whether CALEA can be interpreted to apply to Voice over Internet Protocol (“VoIP”) services or other packet-based services and networks – which is no small matter – it is incumbent upon law enforcement agencies to identify the problems that extending CALEA to such services networks would resolve. Without knowing the

⁵ See, e.g., *Comments of CTIA – The Wireless Association*, at 2 (dated Nov. 8, 2004); *Comments of Motorola, Inc.* at 2, 5 (dated Nov. 8, 2004); *Comments of Cingular Wireless LLC* at 2 (dated Nov. 8, 2004); *Comments of the United States Telecom Association* at 1 (dated Nov. 8, 2004); *Joint Comments of Industry and Public Interest Submitted on behalf of 8x8, Inc. et al.* at 2, 5 (dated Nov. 8, 2004).

⁶ See, e.g., *Comments of Earthlink Inc.*, at 11-15 (dated Nov. 8, 2004); *Comments of Level 3 Communications, LLC* at 1-13 (dated Nov. 8, 2004); *Comments of the National Cable & Telecommunications Association*, at 1-11 (dated Nov. 8, 2004); *Joint Comments of Industry and Public Interest Submitted on behalf of 8x8, Inc. et al.*, at 3-13 (dated Nov. 8, 2004); *Comments of Eliot Spitzer, Attorney General of the State of New York*, at 5-11 (dated Nov. 8, 2004). In particular, the comments of the New York Attorney General noted that,

[e]arlier this year, in investigating narcotics-related crimes, the NY OCTF executed a court-ordered wiretap on a phone in Central New York. Right after the wiretap was implemented, the target, keeping the same phone number, switched to VoIP service provided by Time Warner Cable. Time Warner Cable cooperated with the New York State police in putting the wiretap into effect on its VOIP system. As a result of this wiretap, the OCTF succeeded in seizing four kilos of cocaine, an extraordinary amount for Central New York, and arrested eight individuals.

Id. at 9.

scope of the impediments faced by law enforcement agencies, it is impossible to determine what obligations the Commission should impose on VoIP providers and network operators. It is not enough for the Commission to find that CALEA applies to IP-enabled services; the Commission must also establish what information companies must provide to law enforcement agencies in order to comply with CALEA.⁷ Those requirements imposed on telecommunications carriers do not perfectly translate to the broadband world.⁸ Without knowing the information that law enforcement requires, neither the Commission nor the industry can ensure adequate assistance to law enforcement.

Should the Commission determine that CALEA does apply to VoIP services and broadband networks, it is critical for the Commission not to simply graft existing obligations onto innovative service offering and next-generation networks. CALEA obligations as applied to VoIP providers must be structured to take into account the technology and the marketplace reality in which VoIP services operate.⁹ Accordingly, prior to requiring CALEA compliance, the Commission must work with the industry and law enforcement to develop appropriate standards that would be tailored to take into

⁷ See *Comments of the United States Internet Service Provider Association*, at 17-27 (dated Nov. 8, 2004); *Comments of Level 3 Communications, LLC*, at 5 (dated Nov. 8, 2004); *Comments of Verizon on Commission's Notice of Proposed Rulemaking and Declaratory Ruling*, at 12 (dated Nov. 8, 2004).

⁸ See, e.g., *Comments of the National Cable & Telecommunications Association*, at 13 (dated Nov. 8, 2004) (“The ‘always on’ nature of broadband services, however, makes it unclear what is actually intended by the term ‘access session’ for broadband. This is because, in the normal course, a cable modem service subscriber connects the cable modem to the cable system, plugs it in, turns it on, and, essentially, never turns it off. Given this fundamental difference between dial-up and broadband, it is unclear how the term ‘access session’ applies to broadband service.”). See also *Comments of the United States Internet Service Provider Association*, at 13 (dated Nov. 8, 2004).

⁹ See, e.g., *Comments of Level 3 Communications, LLC*, at 2, 4-9 (dated Nov. 8, 2004); *Comments of Nuvio Corporation*, at 1-3 (dated Nov. 8, 2004); *Joint Comments of Industry and Public Interest Submitted on behalf of 8x8, Inc. et al.*, at 41-42 (dated Nov. 8, 2004); *Comments of SBC Communications*, at 2, 5-16 (dated Nov. 8, 2004).

account the type of VoIP service provided by Vonage and other Internet application providers.

III. IF CALEA IS FOUND TO APPLY, THE COMMISSION MUST GIVE EFFECT TO ALL OF THE STATUTE'S PROVISIONS INCLUDING COST RECOVERY AND A REASONABLE COMPLIANCE TIMEFRAME

In the NPRM, the Commission states that law enforcement has requested that companies providing communications services be required to bare sole responsibility for implementation costs incurred after January 1, 1995, allow for cost-recovery from their subscribers, and preclude such companies from including CALEA implementation costs in their administrative intercept provisioning charges to law enforcement;¹⁰ however, the Commission is bound by the terms of the statute and may not interpret it in a way that does not give effect to all of its provisions. Many commenting parties highlight the fact that CALEA provides a mechanism for companies subject to the statute to obtain compensation in certain instances.¹¹ Specifically, the statute allows for a company to petition the Commission for a declaration that compliance with CALEA is not “reasonably achievable.” If the Commission finds that compliance is not “reasonably achievable,” the company can request compensation for the compliance costs from the Attorney General. If the Attorney General does not agree to pay, then the company is deemed to be in compliance with the statute’s requirements. Clearly, if companies are

¹⁰ See NPRM, ¶119.

¹¹ See, e.g., *Comments of Level 3 Communications, LLC*, at 14-17 (dated Nov. 8, 2004); *Joint Comments of Industry and Public Interest Submitted on behalf of 8x8, Inc. et al.*, at 49-51 (dated Nov. 8, 2004); *Comments of T-Mobile USA, Inc. on Notice of Proposed Rulemaking*, at 12-21 (dated Nov. 8, 2004); *Comments of Rural Cellular Association*, at 7, 15-16 (dated Nov. 8, 2004); *Comments of BellSouth Corporation*, at 42 (dated Nov. 8, 2004); *Comments of SBC Communications*, at 25-29 (dated Nov. 8, 2004).

able to meet the criteria set out in the statute, then compensation is due. The Commission cannot ignore the relevant statutory provisions.

Aside from statutory issues, the Commission must remember the enormous compensation that was made available to traditional providers of telecommunications services in becoming CALEA compliant.¹² Indeed, approximately half a billion dollars was made available to telecommunications carriers to become CALEA compliant.¹³ It is unclear as to why law enforcement would expect a nascent industry to become CALEA compliant and shoulder all of the associated costs when incumbent carriers with market dominance received an enormous amount of assistance from the government. In considering cost recovery issues, it is essential for the Commission to ensure that VoIP services do not become overly burdened with regulatory compliance costs while such services are still in their infancy.

A related issue is the timeframe for compliance. Should the Commission find that VoIP services are subject to CALEA, a ninety-day compliance period may be grossly inadequate.¹⁴ Without knowing the full extent of the obligations for VoIP service providers, it is impossible to establish a timeframe. As the Commission recognizes, CALEA has never been interpreted as applying to VoIP applications and broadband networks. When the statute was passed, traditional providers of telecommunications

¹² See 47 U.S.C. § 1009. See also *Joint Comments of Industry and Public Interest Submitted on behalf of 8x8, Inc. et al.*, at 49-51 (dated Nov. 8, 2004); *Comments of the United States Internet Service Provider Association*, at 37 (dated Nov. 8, 2004).

¹³ See *id.*

¹⁴ See, e.g., *Comments of Level 3 Communications, LLC*, at 12 (dated Nov. 8, 2004); *Comments of SBC Communications*, at 23-24 (dated Nov. 8, 2004).

services had four years of notice not counting any extensions.¹⁵ Instead of attempting to impose an arbitrary solution on VoIP services and packet-based networks, the Commission should work with the industry and law enforcement agencies to develop an appropriate compliance timeframe.

IV. APPLICATION OF CALEA TO VOIP PROVIDERS BASED ON A “MANAGED/NON-MANAGED” DISTINCTION WILL LEAVE DOORS WIDE OPEN FOR BAD ACTORS, ELIMINATING LAW ENFORCEMENT BENEFIT OF CALEA APPLICATION TO VOIP AND CREATES INCENTIVES FOR THEM TO MOVE TO “NON-MANAGED” TECHNOLOGIES

If mandating CALEA compliance is critical to effective law enforcement, why would the Commission limit CALEA to “managed” VoIP services? Vonage maintains that if the Commission should find that CALEA applies to VoIP services, the Commission should not attempt to distinguish on the basis of whether a particular VoIP service is “managed” or “non-managed.”¹⁶ Law enforcement argues that CALEA compliance is required because it need data of a particular type delivered in a certain format to be effective. If this is the case, it does not make sense to limit CALEA obligations to certain VoIP services. If the point of extending the statutory reach of CALEA is to thwart the efforts of spies, terrorists and criminals, the Commission must not allow for the migration of such traffic to technologies that are non-CALEA compliant. To do less is to create a false sense of security. If a criminal, terrorist or spy can evade law enforcement simply by using a “non-managed” VoIP service, then extending CALEA in the manner proposed by the Commission will not effectively

¹⁵ See *Joint Comments of Industry and Public Interest Submitted on behalf of 8x8, Inc. et al.*, at 49-50 (dated Nov. 8, 2004).

¹⁶ See *Comments of the United States Internet Service Provider Association*, at 13-16 (dated Nov. 8, 2004); *Comments of SBC Communications*, at 9-10 (dated Nov. 8, 2004).

protect the United States today since “non-managed” VoIP technology and services are widely available. Attempting to decide which technologies should be included by using a “managed/non-managed” touchstone does not seem to us a workable jurisdictional boundary, both overbroad and under-inclusive. Perhaps a legislative solution is required in order to effectively address the problem. Accordingly, all forms of VoIP services should be subject to CALEA requirements and standards for provisioning such data should sweep in both “managed” and “non-managed” VoIP services.¹⁷

¹⁷ See *Comments of Nuvio Corporation*, at 1-3 (dated Nov. 8, 2004).

V. CONCLUSION

Vonage agrees that the concerns of law enforcement deserve serious consideration. Should the Commission determine that CALEA applies to packetized data communications and the networks over which they traverse, the Commission must engage in a thoughtful deliberative process to determine how to apply CALEA requirements to such communications. First and foremost, law enforcement agencies must clearly define the information they need that they do not have access to now. Then, working with the industry, standards should be established that take into account the realities of the marketplace in which VoIP services operate. The Commission also must allow for a cost recovery mechanism that does not impose excessive burdens on any market entrant. Further, any timeframe for compliance should be developed after standards are established. Finally, should CALEA apply to IP-enabled services, the Commission must apply it to both “managed” and “non-managed” VoIP services and not attempt to distinguish among different types of VoIP services.

Respectfully submitted,

/s/
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Dated: December 21, 2004